

This letter describes how the transfer of assets in a merger of two limited liability companies is not subject to either Retailers' Occupation Tax or Use Tax liability. See 805 ILCS 180/37-30. (This is a GIL.)

April 7, 2003

Dear Xxxxx:

This letter is in response to your letter that was received by our office on December 18, 2002 and your telephone call of January 14, 2003. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120 subsections (b) and (c), which can be found on the Department's Internet website at <http://www.revenue.state.il.us/Laws/regs/part1200/>.

In your letter, you have stated and made inquiry as follows:

We hereby request a private letter ruling as to the retailer's occupation and use tax consequences of the following proposed transaction.

I. FACTS

The taxpayer, Company A, an Illinois limited liability company, proposes a merger with Company B, a STATE1 limited liability company. Both Company A and Company B are owned by individual taxpayer Member 1, who is an Illinois resident. Company B is the owner of an aircraft with a FMV of Five million dollars (\$5,000,000) and a book value of Four million dollars (\$4,000,000). The aircraft was purchased in STATE2, however no sales tax was due as a result of a "flyaway" exemption provided by STATE2 Statute 79-3606(k). Company B is engaged in the business of renting said aircraft, and obtained a resale exemption under the STATE1 Revised Statutes 372.050, so that sales tax was paid on the rental stream in STATE1. Company A has entered an aircraft rental agreement with Company B. Company A and Company B agree to a statutory merger pursuant to which Company B merges into the surviving Company A, and Company B ceases to exist. The members of Company B will be given membership units in Company A, and the aircraft and related items owned by Company B will be transferred to Company A.

II. DETERMINATIONS

The taxpayer hereby requests a determination as to the following alternatives:

- 1) Taxpayer will be allowed to complete the transfer of property exempt from retailer's occupation tax and use tax because the transfer of property is the result of a merger of the entire operation of a business and thus is a transfer by operation of law.
- 2) Taxpayer will be allowed to complete the transfer of property exempt from retailer's occupation tax and use tax because the transfer occurs as part of an isolated sale and is therefore exempt.

III. DISCUSSION OF ISSUES

1) The taxpayer seeks a determination that the transfer of property as a result of the merger of Company B into Company A is not subject to retailer's occupation and use taxation because the transfers were by operation of law. Company B and Company A were merged pursuant to Illinois Statute 805 ILCS 180/37-20. In this merger, the operations of Company B ceased to exist and the assets and liabilities of Company B were transferred to Company A. Under Illinois Statute 805 ILCS 180/37-30(a)(2), the transfer of the tangible property was not the result of a voluntary choice of the parties, but instead occurred as an operation of law resulting from the merger of the two companies.¹ As a transfer by operation of law, the transfer was neither a sale at retail under the provisions of 35 ILCS 120/2, and therefore not subject to retailer's occupation tax, nor a transfer subject to use tax under 35 ILCS 105/3.

2) The taxpayer seeks a determination that the transfer of the aircraft and its related items, due to the merger of the two companies, is exempt from retailer's occupation taxation and use tax as a result of the exemption for an isolated and occasional sales. The Illinois Compiled Statutes provide that retailer's occupation tax is imposed on "persons engaged in the business of selling at retail tangible personal property" (35 ILCS 120/2), and that "(a) tax is imposed upon the privilege of using in this State tangible personal property purchased at retail from a retailer" (35 ILCS 105/3). However, the Illinois Compiled Statutes recognize exemptions from both the retailer's occupation tax and the use tax for isolated and occasional sales:

The isolated or occasional sale of tangible personal property at retail by a person who does not hold himself out as being engaged (or who does not habitually engage) in selling such tangible personal property at retail, or a sale through a bulk vending machine, does not constitute engaging in a business of selling such tangible personal property at retail within the meaning of this Act...(35 ILCS 120/1) [retailer's occupation tax]

The isolated or occasional sale of tangible personal property at retail by a person who does not hold himself out as being engaged (or who does not habitually engage) in selling such tangible personal property at retail or a sale through a bulk vending machine does not make such person a retailer hereunder. (35 ILCS 105/2) [use tax]

¹ In US v Seattle-First National Bank 321 U.S.. 583, a case involving the consolidation of a state bank with a national banking association, the United States Supreme Court stated that "We must look only to the immediate mechanism by which the transfer is made effective. If that mechanism is entirely statutory, effecting an automatic transfer without any voluntary action by the parties, then the transfer may truly be said to be "wholly by operation of law."

In the above situation, the transfer of property occurs as a consequence of the merger of Company B into Company A. The transaction results in the effective sale of Company B as an operating enterprise. By the very nature of this transaction, Company B is a "person who does not hold himself out as being engaged in selling tangible personal property at retail," since the personal being offered for the isolated sale is Company B itself. Upon the completion of the "isolated sale" Company B will cease to exist, and Company A alone will survive. Therefore, the transfer of property occurs as the result of an isolated and occasional sale and is exempt from the retailer's occupation tax and the use tax.

We hereby request that the Department provide a determination letter regarding the proposed transaction for the issues outlined above.

DEPARTMENT'S RESPONSE:

The Illinois Retailers' Occupation Tax Act imposes a tax upon persons engaged in this State in the business of selling tangible personal property to purchasers for use or consumption. See 86 Ill. Adm. Code 130.101. In Illinois, Use Tax is imposed on the privilege of using, in this State, any kind of tangible personal property that is purchased anywhere at retail from a retailer. See 86 Ill. Adm. Code 150.101. These taxes comprise what is commonly known as "sales" tax in Illinois. If the purchases occur in Illinois, the purchasers must pay the Use Tax to the retailer at the time of purchase. The retailers are then allowed to retain the amount of Use Tax paid to reimburse themselves for their Retailers' Occupation Tax liability incurred on those sales. If the purchases occur outside Illinois, purchasers must self assess their Use Tax liability and remit it directly to the Department.

The Illinois Limited Liability Company Act provides that all property owned by each of the limited liability companies that are part of the merger vests with the surviving or new limited liability company.² In addition, the surviving or new limited liability company obtains all of the debts, liabilities, and other obligations of the each of the limited liability companies that are part of the merger.³ The transfer of the assets and liabilities to the surviving or new limited liability company takes place as a matter of law and is not considered a sale at retail. Such a transfer does not result in either Retailers' Occupation Tax or Use Tax liability.

Isolated or occasional sales of tangible personal property at retail by persons who do not hold themselves out as being engaged (or who do not habitually engage) in selling such tangible personal property at retail do not constitute engaging in a business of selling such tangible personal property at retail. See 86 Ill. Adm. Code 130.110. Such persons do not incur Retailers' Occupation Tax liability on the gross receipts from such sales. Consequently, the purchasers of that tangible personal property do not incur a Use Tax liability on those purchases. See 86 Ill. Adm. Code 150.101.

In the situation described in your letter, Company A, as the surviving limited liability company, acquired the aircraft as a matter of law in a merger with another limited liability company and not in sale (either retail sale or occasional sale). Company A acquired not only the aircraft in the merger, but also any liabilities or other obligations that would have been incurred by Company B as owner of that aircraft. If this aircraft were brought into Illinois, the use of that aircraft in this State would generally subject Company A to Illinois Use Tax liability. To put this concept in its simplest form,

² Subsection (a)(2) of 805 ILCS 180/37-30.

³ Subsection (a)(3) of 805 ILCS 180/37-30.

Company A is treated in the same manner as Company B would be if it brought the aircraft into this State. Please note that a credit is provided for tax that was properly due and paid in another State in respect to the sale, purchase, or use of that property. See 86 Ill. Adm. Code 150.310(a)(3).

I hope this information is helpful. The Department of Revenue maintains a website, which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of Section 1200.110(b) described above.

Very truly yours,

Terry D. Charlton
Associate Counsel

TDC:msk